
IN THE

United States Court of Appeals

For the Ninth Circuit

No. 18451 ✓

THE MONTANA POWER COMPANY, *Petitioner*

vs.

FEDERAL POWER COMMISSION, *Respondent*

PETITIONER'S PETITION FOR REHEARING

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MAY 12 1964

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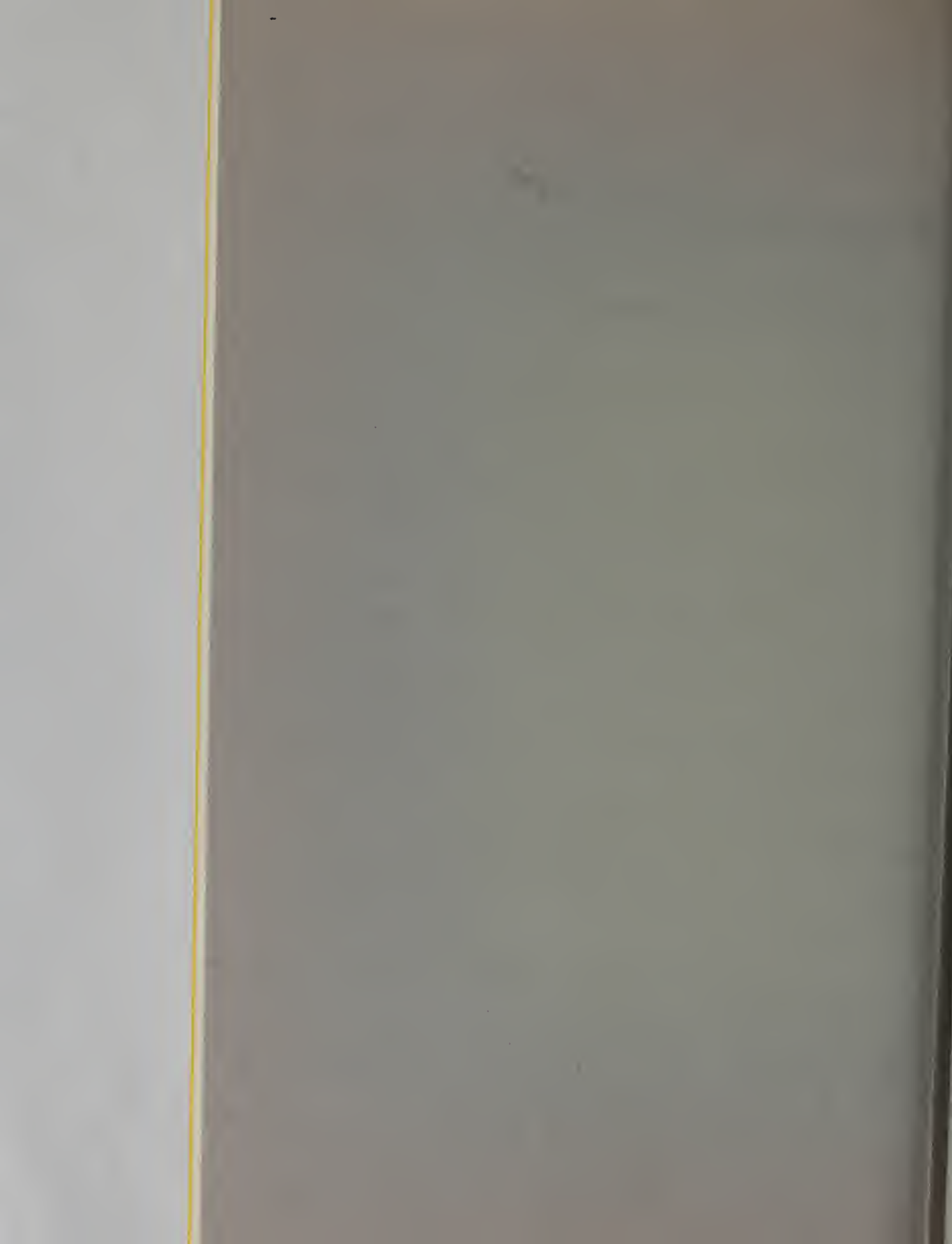
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United States Court of Appeals

For The Ninth Circuit

THE MONTANA POWER COMPANY,
a Montana Corporation

Petitioner,

vs.

THE FEDERAL POWER COMMISSION,
Respondent.

No. 18,451

PETITION FOR REHEARING

TO THE HONORABLE, THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE JUDGES THEREOF:

The Montana Power Company, Petitioner herein, pursuant to Rule 23 respectfully petitions the Court for a rehearing on that portion of the Court's decision and judgment issued April 14, 1964 which holds that the Respondent, Federal Power Commission, did not abuse its discretion in fixing the term of the license issued to Petitioner to expire on December 31, 1969. Petitioner respectfully shows:

(1) The Court correctly states that under Section 6 of the Federal Power Act (16 USC 799) the term of the license is within the sound discretion of the Commission with a maximum period of fifty (50) years. It is Petitioner's position, however, that the Commission did not exercise a sound discretion but

acted in an arbitrary and unreasonable manner in prescribing a term of license of only seven (7) years for the Mystic Lake Project. That the Commission's Order in this matter is arbitrary and unreasonable is shown by the following:

(a) The Commission has not specified such a short license term in any previous license.

(b) It is directly contrary to the policy of the Commission as announced in its decision in the matter of *Public Service Company of New Hampshire* (Opinion No. 357, Project No. 2288, April 25, 1962) and in the Commission's Release No. 11,988 dated May 8, 1962. That policy is to issue licenses for projects constructed prior to 1935 for terms expiring December 31, 1993.

(c) The Commission has, since April 25, 1962, issued long-term licenses for at least eleven other constructed but previously unlicensed projects. The shortest term granted was to December 31, 1993, which was over 30 years from the date the Commission's Order was issued. Eight of these cases are set forth in the Supplemental Appendix submitted by Petitioner to the Court in the present case. The other three orders, issued by the Commission since the oral argument in this case, are as follows:

The Union Water Power Company, Project No. 2302, issued December 2, 1963.

Brown Company, Project No. 2311, issued December 4, 1963.

Penobscot Chemical Fibre Company, Project No. 2312, issued December 9, 1963.

These licenses are for terms *more than 25 years longer* than the license granted to Petitioner for its Mystic Lake Project, No. 2301.

(d) Petitioner's project was constructed, maintained and operated under a pre-existing Forest Service Permit which was in good standing at the time of application for license. It is arbitrary, capricious and unjust for the Commission to penalize such project by the issuance of a license for a shorter term than would be issued for a project which was in trespass.

(2) In the Court's decision it refers to only one case with regard to the term of license; that is the FPC's decision in *Pennsylvania Power and Light Company*, Opinion No. 380, March 13, 1963, cited at page 12. We believe the Court erred in treating that Commission order as relevant to the situation here presented. In the Pennsylvania case there was an existing Federal Power Commission license which had not yet expired and the Commission held that it could not accept surrender of such license and issue a new license for the project as that would, in effect, be extending the term of the existing license contrary to the prohibition of Section 6 of the Act, that a *license* should be for a period not exceeding fifty (50) years. The situation was entirely different from that existing with regard to the Mystic Lake Project of The Montana Power Company. Here we have an initial licensing procedure. The Mystic Lake plant was constructed, maintained and operated under a pre-existing Forest Service Permit which was in good standing at the time of Application for License. Under Section 23(a) Petitioner was entitled to apply for a Federal Power Commission license and the only restriction on the term of license is that contained

in Section 6, that it shall not exceed fifty (50) years. In no previous case of which Petitioner is aware has the Commission limited the *license* to the term of the pre-existing *permit*. Further, the Commission itself did not follow the Pennsylvania case in issuing 50-year licenses to replace minor part licenses in *Nevada Irrigation District* (Project No. 2266) and *Pacific Gas and Electric Company* (Project No. 2310) both issued June 24, 1963.

(3) The Court erred in following the Commission's views with regard to the term of license in the instant case. The Commission states in its brief (p. 8) that it gave full consideration to the "legislative intent". Such is not the case, however. If it had been the intent of Congress to limit the term of a license granted under the Federal Power Act, for a project maintained and operated pursuant to a valid and existing permit, to the term of that pre-existing permit, it would have expressly so stated in Section 23(a) of the Act. Congress did not do this. It stated in Section 23(a) that a person holding such permit may apply for a license, and that "upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this part, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder". The only restriction in the Act on the term of a license is that it shall not exceed fifty (50) years (Section 6). For this Court to permit the Commission's ruling to stand results in a misinterpretation of the Act of February 15, 1901 (31 Stat. 790) and of the Federal Power Act.

(4) The Court erred in failing to give consideration to recent decisions of the Commission issuing

long-term licenses for constructed projects referred to above and also to the Commission's Order in *Duke Power Company*, Project 2232, (20 FPC 360) quoted in our Brief at page 25. While the Commission has discretion as to the term of a license, it is not an unfettered discretion but must be exercised in a reasonable manner in the light of all the circumstances and be in accord with established guides and precedents. No reason has been given by the Commission nor the Court justifying the issuance of only a 7-year license for the Mystic Lake Project.

WHEREFORE, Petitioner respectfully requests the Court to reconsider that portion of its decision of April 14, 1964, relating to the term of license and to remand the matter to the Commission for further proceedings, and for the determination of a license term consistent with the Federal Power Act and the established policy and practices of the Commission thereunder.

Respectfully submitted,

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CERTIFICATE

I hereby certify: that I am one of the Counsel for Petitioner, The Montana Power Company; that in my judgment the foregoing Petition For Rehearing is well founded; and that said Petition is not interposed for delay.

John C. Hauck